Supreme Court, U.S.
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No. 94-1428

In The

Supreme Court of the United States

October Term, 1994

JOHN P. McKENZIE,

Petitioner,

vs.

GENERAL TELEPHONE CO. OF CALIFORNIA, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Where an ERISA disability plan vests discretion to determine benefit eligibility, must expert vocational evidence always be obtained before benefits are denied, where the administrative record supports the conclusion that the claimant does not have an impairment that would prevent him from performing some identifiable job?

LIST OF PARTIES

Petitioner

John P. McKenzie

Respondents

General Telephone Company of California, dba GTEL
GTE Long Term Disability Plan
GTE Medical Benefits Plan
GTE Pension Plan
GTE Life Insurance Plan
The Travelers Indemnity Company of Rhode Island[1]

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[1] The Travelers Indemnity Company of Rhode Island was erroneously named as The Travelers Insurance Company in Petitioner's Complaint. The Travelers Insurance Company has not been a party to this action. The Travelers Indemnity Company of Rhode Island is wholly-owned by The Travelers Inc. The Travelers Inc. is a publicly-traded company.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, The Travelers Indemnity Company of Rhode Island, GTE Long Term Disability Plan, GTE Pension Plan, and GTE Life Insurance Plan, respectfully request that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's decision in this case. That decision is reported at 41 F.3d 1310 (9th Cir. 1994) and is reprinted in Petitioner's Appendix ("PA"). (PA4a.)

STATEMENT OF THE CASE[2]

1. Introduction

Petitioner John P. McKenzie ("Petitioner") was a GTEL Regional Service Manager with more than 16 years of education. He sought benefits under the GTE Long Term Disability Plan ("Plan") issued by The Travelers Indemnity Company of Rhode Island ("The Travelers"). His own doctors, however, concluded that Petitioner's slight physical impairment did not disable him from engaging in all occupations for which he was qualified by training, education or experience. Indeed, Petitioner could be continuously involved in decision-making, could work on his computer, and could drive when the seat provided adequate support. In fact, Petitioner's impairment was so slight that he was even building a boat in his backyard.

The Plan vested The Travelers with the discretion to make eligibility determinations. That evidence showed that Petitioner was not disabled from performing all occupations, and The Travelers therefore determined that he was ineligible for benefits.

It is settled law that The Travelers' determination may be disturbed only if it abused its discretion. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). The

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[2] Petitioner's Statement of the Case omits or misstates numerous facts properly before the Court pertinent to The Travelers' determination of benefit ineligibility. Accordingly, The Travelers includes a brief Statement of the Case.

factual basis supporting The Travelers' decision is uncontroverted, and no additional judicial inquiry is warranted. Petitioner, however, seeks to deprive The Travelers of its vested discretion. Petitioner argues that The Travelers must obtain an expert vocational analysis in *every* case where the claimant's ability to engage in "any occupation" is an issue, regardless of the claimant's impairment or qualifications. Such a requirement, however, is not the law of any Circuit, and would only serve to increase needlessly the costs of administering ERISA plans.

2. Factual Background

a. The Plan

The Plan has two standards for disability benefit qualification: a "regular occupation" standard, which applied to the first 18 months of absence from work, and an "any occupation" standard, which applied after the first 18 months. Under the regular occupation standard, a beneficiary qualified for benefits if he were unable to perform the normal duties of his regular occupation. Under the "any occupation" standard, a beneficiary qualified for benefits if he were unable to engage in any and every duty pertaining to any occupation for which he was or became qualified by training, education or experience. Petitioner qualified for benefits under the "regular occupation" standard, but failed to qualify for benefits under the "any occupation" standard. The "any occupation" standard is the only plan provision pertinent to this petition.

b. The Travelers' Determination of Disability

Petitioner was employed by GTEL as a Regional Service Manager beginning in 1987. In January 1989, Petitioner first sought disability benefits under the Plan due to back pain. On his statement of claim, Petitioner represented that the requirements of his regular occupation included "the ability to travel, walk construction sites and sit at [his] desk or in meetings for hours at a time." Petitioner told his own treating physician, Gerald E. Keane ("Dr. Keane"), that he was "under a very difficult situation at work," and that "because of that[,] this [was] a very good time for him to do whatever he [could] do to devote himself to recovering from his back problems in general." Dr. Keane placed Petitioner on temporary total disability, with a goal to return Petitioner to work in about three months.

In April 1989, Petitioner returned to work, full time. In May 1989, Petitioner told Dr. Keane that he was doing well and that being back at work was probably better for him. Dr. Keane noted that Petitioner was more active, more distracted from his symptoms, and appeared to be coping reasonably well.

Less than a week later, however, Petitioner reported to Dr. Keane that the stress level at work had increased, causing his pain to increase. Dr. Keane opined that Petitioner was temporarily totally disabled, and again placed Petitioner on disability leave effective May 23, 1989. On

May 24, 1989, Petitioner's employment with GTEL was terminated.[3]

The Travelers approved Petitioner's claim for long-term disability benefits under the "any occupation" standard of disability, effective August 26, 1989.

In December 1989, Dr. Keane described Petitioner's subjective symptoms as low back and leg pain, and his objective symptoms as central disk protrusion and mild central stenosis. He reported that Petitioner could be continuously involved in decision-making, operate a motor vehicle, occasionally lift up to 20 pounds, and occasionally stoop or squat, kneel, and reach above his shoulder. Petitioner could also use his head and neck in the static position, and occasionally in the looking up and looking down positions. The only restriction noted by Dr. Keane was that Petitioner could not move quickly around machinery. When questioned directly by The Travelers about Petitioner's suitability for employment, Dr. Keane declined to rule out other suitable occupations.

In June 1990, Dr. Keane reported that Petitioner could intermittently and occasionally sit for half an hour, stand and walk for one to two hours, and lift up to 20 pounds. Dr. Keane further reported that Petitioner could operate a motor vehicle, perform fine finger movements, hand/eye movements, and pushing and pulling.

In August 1990, The Travelers informed Petitioner that it was evaluating whether Petitioner qualified for

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[3] Because Petitioner was absent from work on May 24, 1989 due to disability, The Travelers did not terminate his benefits under the Plan at that time.

benefits under the "any occupation" standard of disability, which would be the operative standard as of November 23, 1990. The Travelers explained that the information from Dr. Keane was inadequate, and requested that Petitioner submit to an independent medical examination ("IME"). Petitioner refused, stating that he would not be seen by anyone other than Dr. Keane. The Travelers informed Petitioner that if Dr. Keane could provide the required objective medical information based on a physical examination related to Petitioner's capabilities and restrictions, The Travelers would reconsider the need to require an IME.

In September 1990, Dr. Keane wrote The Travelers that Petitioner would be restricted from a job requiring repetitive bending or lifting or prolonged postural demands. Because such restrictions did not preclude Petitioner – who had managerial experience and more than 16 years of education – from engaging in all occupations for which he was qualified, The Travelers sought to provide him with another opportunity to prove his disability. The Travelers therefore arranged for Petitioner to be seen by an orthopedist.

Petitioner again refused the IME, and arranged to be examined by his own doctor, Eugene Baciocco ("Baciocco"), a board-certified orthopedic surgeon. The Travelers informed Petitioner that it would accept the findings of his doctor if the doctor could provide it with sufficient information to make a disability determination. On October 18, 1990, Dr. Baciocco examined Petitioner. Petitioner told Dr. Baciocco that he could walk approximately a block before his back pain began, that sitting more than an hour would cause intermittent pain, that he

could not drive to Clear Lake (which is approximately a 100-mile or two-hour drive from Petitioner's home in Walnut Creek), that he was unable to fly his plane cross-country, and that he only had a limited ability to work on his boat.

Dr. Baciocco reviewed Petitioner's MRI, CT scan, and history, and conducted a physical examination. Dr. Baciocco found "few objective signs and evidence of neurological disease," and just some lateral recess stenosis. Dr. Baciocco concluded that Petitioner's inability to work was difficult to explain and inconsistent with his findings, because his work activity involved no heavy duty.

Because neither Dr. Keane nor Dr. Baciocco concluded that Petitioner was precluded from all jobs for which he was qualified by training, education or experience, The Travelers informed him that his long-term disability benefits would be terminated effective November 23, 1990. The Travelers explained that it had not received objective medical documentation supporting Petitioner's claim for disability benefits under the "any occupation" standard.

In April 1991, Petitioner sent The Travelers a report prepared by David L. Kneapler, a rheumatologist. Dr. Kneapler reported that electrodiagnostic tests of Petitioner's spine were normal, his neurological examination unremarkable, and that his physical examination revealed a "healthy-appearing man with a normal general exam." Dr. Kneapler's report also indicated that Petitioner could work on his boat and computer, and could drive when his seat provided adequate support. Moreover, Dr. Kneapler

stated that Petitioner had good motion of his cervical spine, mildly reduced motion of his thoracolumbar spine, and only mild pain with lateral bending.

Although Dr. Kneapler concluded that Petitioner's spinal discomfort prevented Petitioner from returning to any gainful employment, he did not explain how that conclusion was consistent with his findings regarding Petitioner's range of motion, or his ability to drive, work on his boat, work on his computer, or undertake other activities.

Dr. Kneapler's report, therefore failed to provide The Travelers with any level of confidence that Petitioner was disabled. If anything, Dr. Kneapler's objective findings showed that Petitioner was *not* disabled. Given the reports of Drs. Keane, Baciocco and Kneapler, The Travelers concluded that Petitioner was capable of performing sedentary work that did not require walking or being in one position for any length of time. Accordingly, The Travelers determined that Petitioner was not disabled from performing all occupations, and therefore did not qualify for benefits.[4]

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[4] The district court requested additional vocational evidence before entering judgment in favor of The Travelers. Not surprisingly, the evidence showed that given Petitioner's limited impairment, his managerial background, and his level of education, he qualified for hundreds of jobs in two San Francisco Bay Area counties.

Petitioner submitted an evaluation that was based on physical testing performed well after the relevant time period. Even if the evaluation were relevant, however, it would lend support to The Travelers' determination that Petitioner was ineligible. The evaluation stated that Petitioner's lifting ability was adequate

REASONS FOR DENYING THE WRIT

I. WHERE A PLAN VESTS DISCRETION TO DETERMINE BENEFIT ELIGIBILITY, NO CIRCUIT MANDATES THAT EXPERT VOCATION EVIDENCE BE OBTAINED

The Plan vested The Travelers with discretion to make eligibility determinations. Those determinations may be disturbed only if The Travelers abused its discretion and acted unreasonably. *Firestone*, 489 U.S. at 115. The pertinent inquiry, therefore, is not whether expert vocational evidence must be considered in all cases – as Petitioner contends – but whether it is an abuse of discretion to make an eligibility determination without such expert evidence.

In this case, the Ninth Circuit held that The Travelers did not abuse its discretion or act arbitrarily and capriciously when it concluded that Petitioner did not qualify for benefits under the "any occupation" standard. The court found that substantial evidence supported The Travelers' decision, despite the lack of expert vocational evidence. ("[W]e hold that consideration of vocational evidence is unnecessary where the evidence in the administrative record supports the conclusion that the claimant does not have an impairment which would prevent him from performing some identifiable job." *McKenzie*, 41 F.3d at 1317, PA17a.)

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for most managerial positions, and that Petitioner had good potential to return to work in a management-level position. The evaluation also reported that Petitioner spent anywhere from 15 minutes to two hours a day working on his boat, which was inconsistent with his tolerance for less demanding activities in the functional evaluation.

Likewise, in *Duhon v. Texaco, Inc.*, 15 F.3d 1302 (5th Cir. 1994), the Fifth Circuit's inquiry was whether the plan administrator abused its discretion by determining, without expert testimony, that the plaintiff was not disabled. *Id.* at 1304. There, the plaintiff's degenerative back condition precluded him from his employment as a truck driver. The plaintiff, however, was capable of performing sedentary to light work, and he had a high school diploma. Given the strict language of the "any occupation" standard, the Fifth Circuit held that the plan administrator could competently determine disability without vocational testimony. *Id.* at 1309.

Similarly, in *Block v. Pitney Bowes, Inc.*, 952 F.2d 1450 (D.C. Cir. 1992), then-Judge Ginsburg wrote that when an administrator or fiduciary is given discretion to make eligibility determinations, its decisions are reviewable only for reasonableness. *Id.* at 1452. In *Block*, the plaintiff fell and suffered a serious injury that disqualified him from his regular occupation as a sales representative for the defendant. The medical evidence, however, showed that the plaintiff could fill a sales position involving desk and telephone work, some walking, driving, and visiting with clients. Because the medically-indicated limitations were slight, and the plaintiff's occupation was not so specialized, the court held that the fiduciary did not act unreasonably in denying benefits to the plaintiff under an "any occupation" standard. *Id.* at 1455.

Contrary to Petitioner's assertions, the rule in the Eighth Circuit is not different. In *Gunderson v. W.R. Grace & Co. Long Term Disability Income Plan*, 874 F.2d 496 (8th Cir. 1989), cited by Petitioner, the plaintiff was a tool pusher who severely injured his dominant right arm in a

work-related accident. His treating physician found that the plaintiff was not totally disabled from all other occupations, but that retraining would be necessary. His clinical psychologist reported that the plaintiff had "adequate intellectual abilities for retraining in any of a variety of areas." *Id.* at 500.

The administrator initially determined that the plaintiff was eligible for benefits under the "any occupation" provision. Later, without receiving any additional evidence, the administrator determined that the plaintiff was no longer entitled to benefits. Moreover, the administrator admitted that the plaintiff had in fact received no training, education or experience in any new field or occupation. The court found that the administrator's decision to terminate benefits was arbitrary and capricious in using the "same evidence which once supported the finding of disability to now support a finding, applying the same definition of disability under [the 'any occupation' standard], of no disability." *Id.*

Had the plan terminated the plaintiff's benefits as soon as the "any occupation" standard first took effect, the court suggests that it may have deferred to that determination, even without the vocational analysis. The court would not extend such deference to the plan, however, where the plan relied on the same set of facts to find the plaintiff both eligible and ineligible for benefits under the same disability standard. *Id.* Given the utter lack of any additional evidence, the court suggested that the plan should have obtained a vocational expert's opinion to determine if the plaintiff were precluded from performing "any occupation." *Id.* at 499. The court certainly did not hold that such opinions be obtained in all cases.

This conclusion is underscored by the Eighth Circuit's decision in *Potter v. Connecticut General Life Ins. Co.*, 901 F.2d 685 (8th Cir. 1990), a case in which the fiduciary was not given discretion to make eligibility determinations. There, under the less deferential de novo standard, the court distinguished *Gunderson* and held that where the objective medical evidence and the plaintiff's daily activities showed that he was not disabled under the plan, the introduction of vocational evidence was unnecessary. *Id.* at 686.

Therefore, all of the circuit courts that have addressed the requirement of vocational evidence have done so in the context of applying the abuse of discretion standard. The requirement of a vocational analysis in *Gunderson* therefore does not create a conflict among the circuits. Rather, a vocational analysis is merely a factor that a reviewing court may consider in determining whether discretion granted by a plan has been abused – an issue the Ninth Circuit determined was not the case here.

II. NO UNSETTLED QUESTION OF FEDERAL LAW IS PRESENTED BY PETITIONER'S QUARREL WITH THE EXERCISE OF DISCRETION TO DETERMINE BENEFIT ELIGIBILITY

In his petition, Petitioner argues for the first time that a uniform rule should be established regarding what facts must be considered in making disability benefit determinations under an "any occupation" standard. But a uniform rule has already been established: those with

vested discretion to make eligibility determinations must not abuse that discretion. *Firestone*, 489 U.S. at 115.

To dictate specifically what must or must not be considered would effectively usurp that discretion. It would also unnecessarily increase the costs of administering ERISA plans. A finding of nondisability under the "any occupation" standard is not demanding. It requires only that the claimant be able to perform a job for which he is qualified by training, education, or experience. A number of factors may be considered in determining whether a claimant is capable of performing such a job, e.g., the degree of the claimant's impairment, his employment background, his level of education. To require that the cost of an expert vocational assessment be incurred *in every case* would be unwarranted and wasteful. Indeed, this case presents an excellent example of why this is so. Petitioner had managerial experience and more than 16 years of education. He had only a slight physical impairment, and the objective medical evidence failed to support his assertions of a severe limitation of his functional capacity. Concluding that such a person could qualify for other jobs befitting his background and therefore was not disabled under the Plan is reasonable on its face. It does not require vocational evidence to make it so.

Finally, Petitioner's assertion that alternative occupations should be specifically identified ignores the purpose of a disability plan. A disability plan is to provide coverage to a claimant who is unable to work. It "is not a form of employment insurance." *Duhon v. Texaco*, 15 F.3d at 1309. Moreover, no provision in the plan required that The Travelers ensure the availability of an alternative job as a condition of terminating benefits. *See Duhon*, 15 F.3d

at 1309; *Block*, 952 F.2d at 1455; *Jestings v. New England Telephone & Telegraph Co.*, 757 F.2d 8, 11 (1st Cir. 1985).

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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